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Tenaga Nasional Bhd v Yahaya bin Jusoh

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–460 OF 2010
ABDUL WAHAB PATAIL, ROHANA YUSUF AND TENGKU MAIMUN JJCA
20 SEPTEMBER 2013

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Administrative Law — Exercise of judicial functions — Judicial review — Application to quash award of Industrial Court — Reviewing judge reassessing evidence and failing to appreciate evidence — Reviewing judge exceeding his role in judicial review — Whether there was illegality, irrationality or impropriety in Industrial Court's award

D

Administrative Law — Judicial review — Scope of — Role of High Court — Whether review limited to decision making process — Whether High Court may review evidence and substitute its own findings — Whether review may extend to substance of decision

E

Civil Procedure — Judicial review — High Court — Role of — Whether review limited to decision making process — Whether High Court may review evidence and substitute its own findings — Whether review may extend to substance of decision

F

Labour Law — Employment — Dismissal — Absent from work without permission or leave for 187 days — Employee promoted after issuance of show cause letter — Whether there was condonation by employer — Letter of promotion issued by mistake — Whether dismissal with just cause and excuse

G

The respondent was an employee of the appellant. He was dismissed from the services of the appellant after a domestic inquiry found him guilty of a charge of being absent from work without permission or leave for 187 days. The respondent had enrolled for a master's program and had applied for unpaid study leave. However, without waiting for his application to be approved, the respondent absented himself from work. The said study leave application was not approved. Despite a show cause letter and a warning letter being issued, the respondent failed to report for work as directed. The Disciplinary Committee found the respondent guilty and he was dismissed. The respondent contended that there was condonation by the appellant ie that after the issuance of the show cause letter, he was promoted to the position of an admin officer where he

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reported for work on 6 May 2002 at Institut Latihan Sultan Ahmad Shah ('ILSAS') at Bangi. The appellant denied the respondent's allegation of condonation and claimed that the promotion letter was issued by mistake. The learned chairman of the Industrial Court ('chairman') found the dismissal to be with just cause and excuse. On an application for judicial review to quash the award of the Industrial Court, the learned High Court judge ('judge') allowed the application on the grounds that the chairman had failed to address his mind on the issue of condonation. The appellant thus filed this appeal contending that the judge had erroneously exercised appellate jurisdiction in judicial review proceedings.

Held, allowing the appeal with costs:

(1) The role of a High Court in hearing a case of judicial review is highly limited and rules governing judicial review application differ from that of a normal appeal as judicial review is not an appeal from a decision but a review of the manner in which the decision was made. It is not the function of the High Court to review the evidence and substitute its own view for that of the decision-maker and the High Court should not interfere with the decision of the Industrial Court unless there is a real error of law. There are limited exceptions though, where review may extend to substance of the decision and not just the decision making process ie where there is illegality, irrationality or impropriety (see para 14).

(2) The chairman had heard and seen the witnesses and had drawn conclusions from the totality of the evidence presented before him. The issue of condonation was considered by the chairman who accepted the evidence of the witnesses for the appellant on the circumstances leading to the preparation and issuance of the letter of promotion, before making a finding that the letter of promotion was mistakenly issued and was dubiously obtained by the respondent. These were matters for the chairman who had made his decision based on findings of fact (see para 15).

(3) By reassessing the evidence and by considering the matter at hand as an appeal, the judge had exceeded her judicial review function. This was compounded in turn by the judge's failure to appreciate the evidence in its totality (see para 19).

(4) There was no real error on the part of the chairman. Given the fact that the disciplinary proceedings had never been withdrawn or abandoned by the appellant, there was no illegality, irrationality or impropriety in the award of the Industrial Court (see para 23).

[Bahasa Malaysia summary

Responden merupakan pekerja perayu. Dia dipecat daripada perkhidmatan perayu selepas siasatan dalaman mendapati dia bersalah atas tuduhan tidak hadir ke tempat kerja tanpa kebenaran atau tanpa permohonan cuti untuk 187 hari. Responden telah mendaftar untuk program sarjana dan telah memohon cuti belajar tanpa gaji. Walau bagaimanapun, tanpa menunggu permohonannya diluluskan, responden telah tidak hadir untuk bekerja. Itu berkata kajian permohonan kebenaran telah ditolak. Walaupun surat tunjuk sebab dan surat amaran dikeluarkan, responden gagal datang bekerja seperti yang diarahkan. Jawatankuasa Tatatertib mendapati responden bersalah dan dia telah dipecat. Responden berhujah bahawa terdapat kebenaran daripada perayu iaitu bahawa selepas surat tunjuk sebab dikeluarkan, dia dinaikkan pangkat ke jawatan pegawai tadbir di mana dia melaporkan diri pada 6 Mei 2002 di Institut Latihan Sultan Ahmad Shah ('ILSAS') di Bangi. Perayu menafikan dakwaan responden terhadap pembenaran dan mendakwa bahawa surat kenaikan pangkat itu telah dikeluarkan dengan tidak sengaja. Pengerusi Mahkamah Perusahaan ('pengerusi') yang bijaksana berpendapat pemecatan dilakukan atas sebab dan alasan yang adil. Dalam sesuatu permohonan untuk semakan kehakiman bagi membatalkan keputusan Mahkamah Perusahaan, hakim Mahkamah Tinggi ('hakim') yang bijaksana membenarkan permohonan itu atas alasan bahawa pengerusi gagal menangani fikirannya mengenai isu kebenaran. Perayu dengan itu memfailkan rayuan ini dengan alasan bahawa hakim bicara telah terkhilaf menjalankan bidang kuasa rayuan dalam prosiding semakan kehakiman.

Diputuskan, membenarkan rayuan dengan kos:

(1) Peranan Mahkamah Tinggi untuk mendengar kes semakan kehakiman adalah sangat terhad dan kaedah-kaedah permohonan semakan kehakiman berbeza daripada daripada biasa kerana rayuan semakan kehakiman bukanlah suatu rayuan daripada keputusan tetapi kajian semula cara bagaimana keputusan itu dibuat. Ia bukan fungsi Mahkamah Tinggi untuk mengkaji semula bukti dan menggantikan pandangan sendiri dengan keputusan yang telah dibuat oleh pembuat keputusan dan Mahkamah Tinggi tidak perlu campur tangan dengan keputusan Mahkamah Perusahaan melainkan jika ada kesilapan sebenar undang-undang. Terdapat pengecualian terhad walaupun, di mana semakan boleh meliputi kandungan keputusan dan bukan sahaja untuk proses membuat keputusan iaitu di mana terdapat kesalahan undang-undang, tidak rasional atau keputusan salah (lihat perenggan 14).

(2) Pengerusi telah mendengar dan melihat saksi dan telah membuat kesimpulan daripada keseluruhan bukti yang dikemukakan di hadapannya. Isu kebenaran dianggap oleh pengerusi yang menerima keterangan saksi-saksi bagi perayu kepada keadaan yang membawa

kepada penyediaan dan pengeluaran surat kenaikan pangkat, sebelum membuat dapatan bahawa surat kenaikan pangkat telah tersilap dikeluarkan dan secara ragu telah diperolehi oleh responden. Ini adalah perkara-perkara untuk pengerusi membuat keputusannya berdasarkan penemuan fakta (lihat perenggan 15).

(3) Dengan menilai semula bukti dan dengan mempertimbangkan isu yang sedang dihadapi sebagai suatu rayuan, hakim bicara telah melampaui fungsi semakan kehakiman beliau. Ini diburukkan pula dengan kegagalan hakim untuk meneliti keterangan secara keseluruhannya (lihat perenggan 19).

(4) Tidak ada ralat sebenar di pihak pengerusi. Memandangkan prosiding tatatertib tidak pernah ditarik balik atau ditinggalkan oleh perayu, tidak ada kesalahan undang-undang, tidak rasional atau keputusan salah dalam award Mahkamah Perusahaan (lihat perenggan 23).]

Notes

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1078–1149.

For cases on High Court, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5119–5123.

For cases on judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 186–204.

Cases referred to

Jye Tai Precision Industrial (M) Sdn Bhd v Victoria a/p Arulsamy [2008] 2 MLJ 57; [2008] 1 CLJ 760, CA (refd)

Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam [2006] 3 MLJ 493; [2006] 2 CLJ 501, CA (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Appeal from: Application for Judicial Review No R4 (R2)–25–287 of 2006 (High Court, Kuala Lumpur)

S Nantha Balan (P Thavaselvi with him) (Zul Rafique & Partners) for the appellant.

Ram Karpal Singh (Karpal Singh & Co) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The appeal before us is against the decision of the learned High Court judge in allowing the respondent's application for judicial review.

[2] The respondent was an employee of the appellant. He was dismissed

from the services of the appellant after a domestic inquiry found him guilty of a charge of being absent from work without permission or leave for 187 days between 1 November 2001 and 5 May 2002.

[3] The respondent started services with the appellant as a *kerani tingkatan biasa* in January 1990. In May 1997 the respondent was given unpaid study leave to pursue his first degree. In May 1998, the appellant offered the respondent full sponsorship for a period of two years and 11 months to complete his degree. The consideration for the sponsorship is that the respondent was to serve the appellant for two times the total number of years of his approved study leave before he could be released.

[4] Upon completion of the degree, the respondent reported for work on 27 April 2001 at Pejabat Bisnes Daerah, Jalan Klang Lama, Kuala Lumpur and assumed his old post of a clerk. In May 2001, the respondent enrolled for a master's program. He made a written application for an unpaid study leave to the then general manager (Planning and Development Human Resource) ('COW3') in October 2001. The application which was submitted through the respondent's head of department was for a period of two years commencing 1 November 2001 (the said study leave application). Without waiting for approval, the respondent absented himself from work on 1 November 2001.

[5] Vide a letter dated 5 November 2001, COW3 informed the respondent that the said study leave application was not approved. On 13 November 2001 the respondent's head of department received a verbal report that the respondent had been continuously absent from work. On even date, the head of department issued a show cause letter for his absence and directed the respondent to report for work on 15 November 2001. At the same time, a warning letter was also issued to the respondent for taking leave without prior approval from 12–15 October 2001 and 18–23 October 2001.

[6] The respondent failed to report for work as directed. In his reply to the show cause letter, he stated that he assumed that he had obtained approval for the study leave application as his head of department had supported his application. On 20 November 2001, the respondent made an application to his head of department for unpaid study leave for a period of one month commencing 1–30 November 2001. Vide a letter dated 3 December 2001 the respondent was informed that his application for study leave was not approved and that the decision was final.

[7] By a letter dated 8 December 2001 the respondent agreed to report for duty so long as he was not placed at Pejabat Bisnes Daerah, Jalan Klang Lama, Kuala Lumpur. On 8 January 2002 the vice president of human resource replied advising the respondent to make an official application to the manager

(Administration & Management Human Resource) to consider his placement at any other suitable station of the appellant. The respondent failed to make any application and continued to be absent from work.

[8] On 4 April 2002, the respondent's head of department ('COW7') prepared a preliminary investigation report which led to the domestic inquiry being held. The charge against the respondent was 'Tidak hadir bertugas tanpa kebenaran atau cuti mulai 1 November 2001 hingga 5 Mei 2002'. The disciplinary committee found the respondent guilty and he was dismissed. His appeal to the appeal committee was rejected.

[9] In his representation to the Industrial Court, the respondent contended that there was condonation by the appellant ie that after the issuance of the show cause letter, he was promoted to the position of an admin officer where he reported for work on 6 May 2002 at Institut Latihan Sultan Ahmad Shah ('ILSAS') at Bangi.

[10] The appellant denied the respondent's allegation of condonation. The appellant's case essentially is that the promotion letter was issued by mistake.

[11] Having heard the witnesses, the learned chairman of the Industrial Court found that the appellant had proven that the respondent was absent without leave from 1 November 2001–5 May 2002 and as such the respondent was in gross violation of discipline. The learned chairman accordingly found the dismissal to be with just cause and excuse.

[12] The respondent filed an application for judicial review to quash the award of the Industrial Court. The main ground was in relation to the issue of condonation. The learned High Court judge allowed the application. Her Ladyship was of the view that the learned chairman of the Industrial Court had committed an error of law in failing to address his mind on the issue of condonation and found the award of the Industrial Court to be tainted with irrationality.

THE APPEAL

[13] The centre of the appellant's complaint is that the learned judge had erroneously exercised appellate jurisdiction in judicial review proceedings.

[14] The role of a High Court in hearing a case of judicial review is highly limited and rules governing judicial review application differ from that of a normal appeal as judicial review is not an appeal from a decision but a review of the manner in which the decision was made. It is not the function of the

High Court to review the evidence and substitute its own view for that of the decision-maker and the High Court should not interfere with the decision of the Industrial Court unless there is a real error of law. There are limited exceptions though, where review may extend to substance of the decision and not just the decision making process ie where there is illegality, irrationality or impropriety (*R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493; [2006] 2 CLJ 501; *Jye Tai Precision Industrial (M) Sdn Bhd v Victoria a/p Arulsamy* [2008] 2 MLJ 57; [2008] 1 CLJ 760).

[15] In the present case, the learned chairman of the Industrial Court has heard and seen the witnesses and has drawn conclusions from the totality of the evidence presented before him. The issue of condonation was considered by the learned chairman who accepted the evidence of the witnesses for the appellant on the circumstances leading to the preparation and issuance of the letter of promotion, before making a finding that the letter of promotion was mistakenly issued and was dubiously obtained by the respondent. These were matters for the learned chairman who had made his decision based on findings of fact.

[16] The relevant part of the award by the learned chairman is reproduced below for ease of reference:

> The claimant contended that when he received the show cause letter dated 13 November 2001 directing him to report for work on 15 November 2001, he made an appointment to see the vice president of the Group Human Resource Department, one Datin Azizah bt Osman. He stated that Datin Azizah had advised him to stop his studies and report for work. Further that she had offered to promote him from the post of clerk to the position of admin officer and that he was to report on 6 May 2002 to the 'Institut Latihan Sultan Ahmad Shah' at Bangi. He stated that he took her advice and reported at the institute on 6 August 2002. The claimant produced a photocopy of the offer letter titled 'Tawaran Kenaikan Pangkat ke Gred E12'.
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> The claimant also stated in his evidence that COE5 Mr Wan Razak bin Wan Ismail (*Pengurus Besar*, Bahagian Hal Ehwal Dalaman TNB) handed over the letter of promotion to him and instructed him to report at the institute. Mr Wan Razak testified that four copies of the letter offering promotion to the claimant were prepared and sent to Datin Azizah (Vice President of Human Resource). He said that the claimant's copy (COE23) and the vice president's copy (COE25) were sent to the vice president. The third copy (COE29) was sent to the Institute and the fourth copy was kept in the office file. The witness stated that the claimant's copy was not handed over to the claimant and it was returned to the vice president (Human Resource). This is because Ms Khalidah bt Haron COW4 (Ketua Pengurusan & Pembangunan Sumber Manusia) had decided to withhold the letter. COW4 Khalidah explained that when the claimant's letter of promotion was brought to her attention in May 2002, she realised that there was some on-going

disciplinary action against the claimant. She then informed Datin Azizah by letter (COE24) of the pending action against the claimant and returned the original copy of the claimant's letter of promotion (COE23) to her.

The effect of the unrebutted evidence of COW4 (Khalidah) and COW5 (Wan Razak) is that the claimant's letter of promotion was issued mistakenly. But on realising the mistake, the offer letter was not handed over to the claimant. In these circumstances, the court can only conclude that the photocopy of the promotion letter produced by the claimant was obtained by dubious means.

[17] The learned judge in her grounds of judgment states that the clear evidence of condonation can be seen from the appellant's conduct in letting the respondent to continue to hold the promoted post as admin officer until his dismissal in November 2002 notwithstanding that disciplinary proceeding against the respondent had already commenced.

[18] This is what the learned judge said:

… if the said letter of offer of promotion was indeed mistakenly issued as alleged and as found by the learned chairman in view of his pending disciplinary action why was the applicant not immediately transferred back to his previous position upon the mistake being discovered? Why was the applicant allowed to continue to serve as an admin officer at ILSAS in the promotion post of Gred 12?

COW5 was then the *pengurus besar (perjawatan)* Bahagian Sumber Manusia Kumpulan. He was also covering the post of *ketua pengurusan* Tatatertib TNB. He was in a position to transfer the applicant back to his previous post of *kerani tingkatan biasa* (Gred JG11). Instead, as stated earlier, the applicant was allowed to serve at ILSAS in his promoted post of admin officer Gred E12.

To me this is clear evidence of condonation and the fact that the applicant was not paid the salary of an executive but had continued to receive the salary of a clerical staff or that he was not authorised to give seminars, lectures or training did not nullify the fact that the first respondent intended to promote the applicant to the position of admin officer Gred E12 …

[19] We are of the view that by reassessing the evidence and by considering the matter at hand as an appeal, the learned judge had, with respect, exceeded her judicial review function. This was compounded in turn by Her Ladyship's failure to appreciate the evidence in its totality.

[20] Why the respondent was allowed to remain as an admin officer at ILSAS was explained by COW5 as can be seen below:

29. S: Mengapakah anda telah memaklumkan Pengurus Besar ILSAS bahawa yang Menuntut hendaklah dianggap sebagai Pegawai Tadbir Gred E12 mulai tarikh dia telah melaporkan diri pada 6.5.2002 jika Yang Menuntut tidak dinaikkan pangkat?

> J: Memandangkan Yang Menuntut telah memperolehi satu salinan surat tawaran tersebut dan telah melaporkan diri di pejabat ILSAS berkuatkuasa pada 6.5.2002 serta telah diterima oleh pihak ILSAS dari tarikh tersebut, saya memutuskan untuk mengekalkan sebagaimana keadaannya pada masa itu (status quo) tertakluk kepada syarat yang Menuntut dibayar gaji seorang yang berjawatan kerani. 9 Ini dilakukan memandangkan penyiasatan ke dalam fakta-fakta keadaan di mana Yang Menuntut telah menerima salinan tawaran tersebut yang dibawa bersamanya ke ILSAS pada 6.5.2002 … dan juga kerana tindakan tatatertib sedang diambil terhadap Yang Menuntut.

[21] The above explanation clarified the letter that COW5 wrote to *pengurus besar* ILSAS dated 18 September 2002:

> Ingin dimaklumkan bahawa Encik Yahaya bin Jusoh, P/No. 25797 hendaklah dianggap sebagai seorang Pegawai Tadbir Gred E12 mulai tarikh beliau melaporkan diri pada 6 Mei 2002. Walau bagaimanapun, atas sebab-sebab yang Puan sedia maklum dan buat sementara ini, beliau hanya akan dibayar gaji berdasarkan gaji ketika beliau berjawatan Kerani sahaja.

[22] In the light of the above, there was clear evidence before the Industrial Court that the respondent was allowed to remain as an admin officer at ILSAS which maintained his previous salary without any increase associated with promotion, pending investigation into how he obtained the letter of promotion and pending disciplinary proceedings.

[23] As such, we do not find any real error on the part of the learned chairman. Given the fact that the disciplinary proceedings had never been withdrawn or abandoned by the appellant, there is no illegality, irrationality or impropriety in the award of the Industrial Court.

[24] In substituting her own views to that of the learned chairman and in coming to a different conclusion on facts, on the basis of the same evidence, we find that the learned judge has not acted within the parameters of the certiorari jurisdiction and has erred in so overruling the award by the Industrial Court. We therefore allowed the appeal with costs, set aside the order of the High Court and restored the award of the Industrial Court. Costs was fixed at RM15,000 here and below.

Appeal allowed with costs.

Reported by Kanesh Sundrum